ORIGINAL

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

UNITED TRANSPORTATION UNION ILLINOIS STATE LEGISLATIVE BOARD	)	
Petition for rulemaking to require safe walkways for railroad employees in the state	)	TO3-0015

BRIEF OF UNITED TRANSPORTATION UNION IN RESPONSE TO BRIEF OF NORFOLK SOUTHERN RAILWAY CO., ET. AL.

The Norfolk Southern Railway Company, and the five other railroads (hereinafter "NS"), basic arguments are that the regulation is preempted by the Federal Railroad Administration regulations, that the Illinois Commerce Commission((hereinafter "ICC") does not have statutory authority to promulgate the rule, and that some parts of the proposal is vague.

1. **The ICC is not preempted from adopting the regulations proposed by United Transportation Union and three of the nation's largest railroads.**

The NS at pp. 2-6 argues that the proposed rule is preempted by federal law, citing old cases decided prior to the Supreme Court decision in CSX Transportation, Inc. v. Easterwood, 507 U.S. 658(1993). We will first discuss the legislative history of the Federal Railroad Safety Act of

1970(hereinafter "FRSA"), and then analyze the relevant cases. Also, we will point out the view of the Federal Railroad Administration(hereinafter "FRA") regarding preemption of state laws covering walkways.

a. Section 20106 Of The Federal Railroad Safety Act Explicitly Provides For State Regulation Of Rail Safety.

While the FRSA vests broad regulatory authority of rail safety matters in the Secretary, section 20106 of the FRSA explicitly authorizes state regulation of railroad safety. A state may regulate railroad safety until such time as the FRA has adopted a regulation covering the same specific subject matter. Even if the federal government has regulated the subject matter, the state may regulate safety if it is necessary to eliminate a local safety hazard.

The statute provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order, related to railroad safety when the law, regulation, or order--
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> (1) is necessary to eliminate or reduce an essentially local safety hazard;
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> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106. *See*, Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1112 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973); Burlington Northern R.R. Co. v. Montana, 880 F.2d 1104 (9th Cir. 1989).

The language of FRSA, its legislative history, and the court decisions interpreting it, make it clear that Congress did not intend to displace state rail safety regulations absent the specific exercise of federal regulatory authority. *See,* Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926); CSX Transportation, Inc. v. Easterwood, *supra.*

b. The Legislative History Of The FRSA Evidences Congressional Intent That States Regulate Railroad Safety.

In testifying on the proposed rail safety legislation, then Secretary of Transportation John Volpe discussed Senate Bill 1933, as passed by the Senate, pointing out the areas of permissible state jurisdiction over railroad safety. The relevant portion of Secretary Volpe's testimony states:

> To avoid a lapse in regulation, federal or state, after a federal safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be

so whether such state requirements were in effect on or after the date of enactment of the federal statute.... (underlining added).

Hearings on H.R. 16980 Before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d. Sess. 29 (1968).

remainder of that section.

The Congressional reports reiterated the authority of states to regulate railroad safety. The Senate Report explained:

> The committee recognizes the state concern for railroad safety in some areas. Accordingly, this section [105] preserves from Federal preemption two types of state power. First, the states may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All state requirements will remain in effect until preempted by federal action concerning the same subject matter. (underlining added).

S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (1969)

The House Report stated:

> Section 205 of the bill declares that it is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable. It provides, however, that until the Secretary acts with respect to a particular subject matter, a state may continue to regulate in that area. Once the Secretary has prescribed a uniform national standard the state would no longer have authority to establish statewide standards with respect to rail safety.

H.R. Rep. No. 91-1194, 91st Cong., 1st Sess., 19 (1970), (underlining added).[1/]

[1/] Section 105 of the Senate bill S. 1933, as reported, and section 205 of the House bill, as reported,

As Congress has explicitly stated, the FRSA prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the state. It cannot be said, therefore, that the adoption of federal regulations which merely address a subject matter circuitously, are intended to preempt state railroad safety regulations. Only where the FRA has enacted a regulation covering the same subject matter as the state regulation are both the clear manifestation of congressional preemptive intent and the irreconcilable conflict between a state and federal regulation present which require preemption of the state regulation. N.Y.S. Dept. of Social Services v. Dublino, 413 U.S. 405 (1973); Wisconsin v. Wisconsin Central Transportation Corp., 546 N.W.2d 206, 210 (Wis. 1996) stating "[t]he use of ...'covering' in the preemption clause suggests that the Congressional purpose was to allow states to enact regulations relating to railroad safety up to the point that federal legislation enacted a provision which specifically covered the same material." (underlining added); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); CSX Transportation, Inc. v. Easterwood, *supra*.

The initial inquiry in determining whether the Illinois regulation is preempted by federal law depends upon whether the federal government has

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are incorporated into 49 U.S.C. § 20106.

prescribed a regulation covering the same subject matter of the State requirement.

c. Pursuant To CSX Transportation, Inc. v. Easterwood, State Laws Are Not Preempted Unless The Federal Government Has Adopted Regulations Which Substantially Subsume The Subject Matter Of The State Law.

With respect to preemption generally, the Supreme Court has observed that:

> Preemption fundamentally is a question of Congressional intent ... and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.

English v. General Elec. Co., 496 U.S. 72, 78-79 (1990).

Congress adopted the FRSA in response to growing concerns about threats to public safety, and did not intend to reduce public protection through this action by creating regulatory voids, for "otherwise the public would be unprotected by either state or federal law...." Thiele v. Norfolk & Western Ry. Co., 68 F.3d 179, 184 (7th Cir. 1995). As another court observed:

> Perhaps Congress can preempt a field simply by invalidating all state and local laws without replacing them with federal laws, but [the act creating the FRSA express preemption statute] discloses no such intent. Directing the Secretary of Transportation to preempt a field is not the same as preempting the field; here, Congress has done only the former.

Civil City of South Bend, Ind. v. Consolidated Rail Corp., 880 F. Supp. 595, 600 (N.D. Ind. 1995).

Congress clearly provided a continuing role for state regulation of railroad safety to avoid the creation of regulatory gaps. In Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992), the Court stated:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, " Malone v. White Motor Corp., 435 U.S. at 505, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

In Easterwood, the Supreme Court interpreted for the first time the preemptive scope of 49 U.S.C. § 20106, defining the circumstances under which the Secretary is deemed to have issued regulations "covering the subject matter" of state regulations, and thus preempting the state regulation of the said subject matter. The Court began its preemption analysis citing the long held notion that, "[i]n the interest of avoiding unintended encroachment on the authority of the States, ... a court interpreting a federal statute ... will be reluctant to find preemption." *Id.* 507 U.S. at 663-64 (underlining added). Similarly, the Court observed that preemption of state law under the FRSA is subject to a "relatively stringent standard," and a "presumption against preemption." *Id.* at 668 (underlining added). The Easterwood decision has been interpreted to mean that "a presumption against preemption is the appropriate point from which to begin [a

preemption] analysis." In re Miamisburg Train Derailment Litigation, 626 N.E.2d 85, 90 (Ohio 1994); Southern Pacific Transportation, Co. v. Public Utility Comm'n of Oregon, 9 F.3d 807, 810 (9th Cir. 1993) (stating "In evaluating a federal law's preemptive effect, however, we proceed from the presumption that the historic police powers of the state are not to be superseded by a federal act 'unless that [is] the clear and manifest purpose of Congress'").

The Court, in Easterwood, held that a subject matter is not preempted when the Secretary has issued regulations which merely "touch upon" or "relate to" that subject matter. *Id.,* 507 U.S. at 664. The Court stated that Congress' use of the word "covering" in § 20106 "indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.,* (underlining added). The Court recognized the state interest and right to regulate railroad safety, noting that "[t]he term 'covering' is ... employed within a provision that displays considerable solicitude for state law in that its express preemption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665 (underlining added).

The Supreme Court's analysis of the facts in the Easterwood case is instructive. The Plaintiff in that wrongful death action alleged that the

railroad company was negligent under state common law in two respects: for failing to maintain an adequate warning device at a highway crossing and for operating the train at excessive speeds. The railroad company defended on the ground that various FRSA regulations preempted both state law claims. The Court found that the Plaintiff's excessive speed claim was preempted because the FRA had adopted regulations specifically setting the maximum allowable operating speeds for such trains and that this "should be understood as covering the subject matter of train speed." 507 U.S. at 675. However, because federal regulations requiring certain warning devices at some highway crossings[2/] did not apply to the specific crossing at issue, the Court found that the Plaintiff's second claim was not preempted. *Id.* at 670-73. The Court thus required evidence of very specific "clear and manifest" federal regulation on the same subject matter covered by state law before the state law was preempted.

The Supreme Court's "substantially subsumes" language has been read to mean that, if a federal regulation does not "specifically address" the subject matter of the challenged state law, it does not "substantially subsume" and thus preempt it. Miamisburg, 626 N.E.2d at 93.

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[2] / Namely, those in which the installation of warning devices were funded by the federal government. *cf..*, Norfolk Southern Railway Co. v. Shanklin, 529 U.S. 344(2000).

Similarly in Southern Pacific Transportation Co. v. Public Utilities Comm'n of Oregon, the court noted that:

> To prevail on the claim that the regulations have preemptive effect, petitioner must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.

Id., 9 F.3d at 812.

The court continued:

> ...in light of the restrictive term "cover" and the express savings clauses in the FRSA, FRSA preemption is even more disfavored than preemption generally.

Id., at 813.

Before finding that a state law is preempted, other courts have required parties to demonstrate this high degree of specificity of federal regulation on the same subject as state law since Easterwood. *See, e.g.,* Miller v. Chicago & North Western Transp. Co., 925 F. Supp. 583, 589-90 (N.D. Ill. 1996) (state claim based on violation of building code requiring railings around inspection pits not preempted because FRA had adopted no affirmative regulations on the subject); Thiele, *supra,* 68 F.3d at 183-84 (no preemption of state law "adequacy of warning claims" prior to time that warning devices "explicitly prescribed" by federal regulations are actually

installed); Miamisburg, 626 N.E.2d at 93 (federal regulation allowing continued use of old tank cars lacking safety equipment required on newer cars does not preempt state tort law claim of duty to retrofit old cars with such equipment

The Easterwood decision is in keeping with an earlier decision of the United States District Court for the Northern District of California in Southern Pacific Transportation Co. v. Public Utilities Comm'n of California, 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd per curiam*, 820 F.2d 1111 (9th Cir. 1987). That court held that in order for there to be federal "subject matter" preemption of state regulations, the federal regulation must address the same safety concern as addressed by the state regulation. Judge William Schwarzer explained:

> [T]he legislative history of the FRSA indicates that Congress's primary purpose in enacting that statute was 'to promote safety in all areas of railroad operations.' H.R. Rep. No. 91-1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4104 [cited as House Report]; see also 45 U.S.C.A. § 421 (West 1972). Congress's concern extended to the safety of employees engaged in railroad operations. House Report at 4106. Read in the light of that history, § 434 manifests an intent to avoid gaps in safety regulations by allowing state regulation until federal standards are adopted.

Id. at 1225 (underlining added).

See also, National Association of Regulatory Utility Comm'rs v. Coleman, 542 F.2d 11 (3d. Cir. 1976), where the Third Circuit held that only the precise subject matter of the FRA regulations (monthly accident reporting requirements) was beyond a state's regulatory authority. However, FRA regulation of monthly accident reporting requirements would not preclude states from requiring immediate notification of rail accidents, nor from requiring railroads to furnish copies of monthly FRA reports to the state. *Id.* at 15.

2. State walkway regulations are valid.

The issue of the validity of state regulations covering walkways has already been decided by various courts. In Southern Pacific v. California Public Utilities Commission, *supra,* the court held at the State of California had authority to issue and enforce regulations covering walkways. The railroad in that litigation argued that a FRA/ OSHA policy statement covering each agency's jurisdiction over railroads preempted the state's walkway regulations. The court rejected that argument. In accord, Grimes v. Norfolk Southern Ry. Co., 116 F.Supp, 2d 995, 1002-1003(N.D. Ind. 2000); Illinois Central Gulf R.R. v. Tennessee Public Service Commission, 736 S.W. 2d 112, 116(Tenn. Ct. App. 1987).

The NS attempts to distinguish the Southern Pacific case by arguing that the court relied upon the fact that the federal regulations did not have the same purpose. (NS Br.at 5). The fact that the federal regulations may not have the same purpose can also show that the regulations do not " substantially subsume" the same subject matter. *See*, Easterwood , *supra,* 507 U.S. at 664.

The three cases cited by NS that the walkway regulation is preempted all predate the Easterwood decision. None of those cases analyzed whether the federal regulations substantially subsume state walkway standards. In Missouri Pacific .R. Co. v. Railroad Commission of Texas, 948 F.2d 179(5th Cir.1991), NS states that the court held that the walkway requirements "add" to federal track safety standards, and therefore are preempted. (NS Br. at 4). That does not meet the "substantially subsume " standard. The Black v. Seaboard System R.R. case, 487 N.E.2d 468(Ind. Ct. App. 1986) was effectively overruled by a subsequent federal decision in Indiana after Easterwood . Grimes v Norfolk Southern Ry. Co., *supra.* The Grimes court correctly noted that the FRA regulations are directed toward creating a safe roadbed for trains, not a safe walkway for railroad employees who must inspect the trains and perform numerous trackside inspections. 116 F. Supp.2d at 1002-3. The Norfolk and Western Ry. Co. v. Burns, 587 F. Supp.

161(E.D. Mich.1984), relied upon by NS, is one judge's opinion, and simply wrongfully decided.

3. Cases previously decided in the Seventh Circuit do not help NS in this case.

On p. 7, the NS discusses three cases decided by the Seventh Circuit regarding preemption of state law under the FRSA. Neither of those cases are help to NS in the present proceeding. In Michigan Southern R.R. v. City of Kendallville, 251 F.3d 1152 (7th Cir.2001), the court held that a local weed control ordinance is invalid. The UTU agrees that no local authority has power to regulate railroad safety under the FRSA. Only states can do so. That case has no relevance to the present proceeding. Likewise, Waymire v Norfolk & Western Ry. Co., 218 F.3d 773(7th Cir. 2000) has no relevance here. That case involved the issue of unsafe speed and failure of the railroad to install additional warning devices. The Easterwood case, and Norfolk Southern v. Shanklin, 529 U.S. 344(2000) settled that issue.

Lastly, NS cites Burlington Northern and Santa Fe Ry. Co. v. Doyle, 186 F.3d 790(7th Cir. 1999). That case involved the validity of a state requirement for a two person crew on a locomotive. The NS misstates the ultimate holding in that case. The court upheld the power of the state to mandate two person crews.

4. The Federal Railroad Administration recognizes that States may adopt walkway standards and would not be preempted.

In 1976-7 the FRA was considering the issuance of a regulation covering walkways on bridges and trestles. FRA Docket No. RSB-1. The railroads opposed the issuing of the rule because of the wide variety of conditions that exists on railroads, including topography and weather. As a result, FRA decided against issuing a rule. In doing so it stated that:

> The issuance of a Federal standard for walkways might be counterproductive since it would generally preempt the States from carrying out their responsibilities under existing State laws except where an essentially local safety hazard could be identified.
>
> ....
>
> Finally, if an employee safety problem does exist because of the lack of walkways in a particular area or on a particular structure, regulation by a State agency that is in a better position to assess the local need is the more appropriate response.
>
> 42 F.R. 22181,22185, May 2, 1977.

While the rulemaking was directed to walkways on trestles and bridges, the analysis quoted above included all walkways.

5. The ICC has statutory authority to adopt the proposed rules.

The NS at 7-11 argues that the ICC has not been delegated statutory authority to regulate walkways. It states that 625 ILCS 5/18c-7101 is not a

grant of rulemaking authority, but merely a statement of the ICC's enforcement powers. NS Br. 8. The ICC's grant of rulemaking authority is set forth at 625 ILCS 5/18c-1202. The specific wording is that the jurisdiction of the ICC shall extend to rail carriers, and in the enumeration of those powers the ICC shall have the power to "Adopt appropriate regulations setting forth the standards and procedures by which it will administer and enforce this Chapter..." Subsec. (9). This is clearly the grant of plenary powers being delegated to the ICC. On p. 8 the NS cites Board of Trustees of the Univ. of Illinois v. Illinois Educ. Labor Relations Bd, 653 N.E. 2d 882, 884(1st Dist. 1995) to argue that regulations promulgated under 5/18c-1202 cannot extend or alter the operation of the statutory authority. First, that case did not interpret the statute which is at issue in the present case. Also, that court said : "An administrative regulation carries the same presumption of validity as a statute, and so long as the regulation furthers the purpose of the statute and is not arbitrary, unreasonable or capricious, it will be sustained." *Id.*

The NS at p.9-10 argues that Section 5/18c-7401 does not give the Commission power to adopt the proposed rules. We agree that this section

does not grant such authority.[3] The NS attempts to bootstrap walkways under that statute by arguing that walkways are part of track structure. Everyone but NS realizes that is not the case.

6. Adoption of walkway standards by other states

More that half of the states in the country have walkway rules . They vary in the specifics, but the jurisdiction exercised is the same—walkways. A few of the regulations were admitted into evidence at the hearing on September 2, 2003. (Pet. Exh. Nos.11-15). Some other states rules were cited by NS in its brief at p.12 fn 2. While the NS attempted to distinguish those regulations, they all covered walkways, even though the scope of the rules varied from state to state. That is exactly what the FRA was referring to in the proposed rulemaking regarding trestles and bridges. (See this brief at p. 15).The conditions in each state may differ, and each state should not be preempted from tailoring a walkway rule to meet its specific conditions.

7. The proposed rules will improve safety in Illinois.

The NS at 13-17 argues that the proposed rules will not have a positive impact on railroad safety in the state. That is counter to the three major class one railroads that have agreed to the proposed regulations. In

[3] We acknowledge that the original petition cited this section as authority to issue the rule. Upon further research by counsel, that citation was in error.

addition, the Petitioner presented evidence at the hearing showing the safety problems in the state.(See Pet.Exhs. 4-7, and Hearing Tr. At 40-42,58-59).[4]

On p. 14 NS says that there is no evidence that the use of remote control devices will lead to injuries. However, Mr. Mike Oakley from CN admitted on cross examination that persons with big stomachs may have difficulty seeing the ground in front when walking and using the remote control box.(Hearing Tr. 91-92).

The NS at 15 discusses ballasts and states that it is regulated by FRA, citing 49 C.F.R. § 213.103. It is regulated by FRA only to the extent of supporting the track structure. Subpart D of the said FRA track standards , of which this section is included, is entitled "Subpart D-Track Structure". It has no application to walkways.

On p. 15 the NS says that the ballast size requirements set forth in the proposed rule are not consistent with those recommended by AREMA . The ballast sizes were taken directly from the AREMA recommendations.(*See*, Pet. Exh. 8). It further argues that it may be necessary to deviate from the AREMA standards in certain conditions, or to have the ballast slope in excess of that in the proposal.(NS Br. 16-17). If that is the case, the waiver provisions in the proposal would allow for the deviation, if warranted.

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[4] Hearing Tr. Refers to the Hearing in this proceeding on October 2, 2003.

On p. 17, NS argues that there is no safety data supporting that larger ballast results in increased injury rates, and at the hearing presented testimony that the safety data does not warrant regulating walkways. (Hearing Tr.at 135-136, 145-146). This is contrary to the testimony of Mr. Joseph Szabo at the hearing (*See also,* Pet. Exh. 19). Also, there are two other reasons that NS is in error. First, the railroads alone make the determination as to the cause of each accident/incident. That is why human error is consistently ranked as the highest cause of accidents/incidents.(*See,* Hearing Tr. 150). The railroads have a large economic interest in making human error the cause of an accident/incident. It will have an impact on potential recoveries under the Federal Employers Liability Act. The second reason NS is in error here is the common and known practice of railroads underreporting accidents/incidents. This has been known for many years by the employees, as well as Congress. *See,* Comments of Senator John Heinz, 133 Cong. Rec. 17342(Daily ed., Dec. 4, 1987). In 1989 the U.S. General Accounting Office issued a report on its investigation of underreporting injuries and accidents. The study is entitled Railroad Safety-FRA needs to Correct Deficiencies In Reporting Injuries and Accidents. The GAO selected 5 railroads to audit, and each one operates in the state of Illinois. It

determined that the data base was unreliable because of serious underreporting. In summary the GAO found:

1. Lost work days associated with employee injuries, which is an FRA measure of injury severity, were underestimated by 269% at 4 of the railroads.
2. FRA data reflected only 57% of the actual number of severe injuries at 3 of the railroads surveyed.
3. The railroads underreported by 57% the amount of property damage sustained in 171 accidents.
4. Three railroads did not report 61 of 521 injuries that were required to be reported.
5. Three of the railroads collectively underreported accidents by 10%. One railroad underreported by almost 43%.

While the GAO report is 14 years old, nothing much has changed in the railroad industry's failure to accurately report accidents/incidents.

On p. 17, NS states that the proposed walkway slope of one inch in elevation for every eight inches in length is safer than any other slope, and that there is no railroad engineering basis for such standard.(*See also,* Hearing Tr. 197, 226, 244-245). First, if any other slope is safer under a given set of circumstances, the railroad may seek a waiver. Secondly, the

western states with walkway standards have used such a standard for many years with the concurrence of the civil engineers on BN/SF R.R. and the Union Pacific R.R. The California rule has been in effect since 1963.

8. The proposed rule is not unduly burdensome, difficult to comply with, nor difficult to administer.

The NS at pp.18-23 argues that the rule is unworkable for the above stated reasons. It has not been a problem for BN/SF nor UP after many years of being subject to similar rules. Also, the CSX has no problem with the proposal.

On p. 18, NS says that the words "reasonably uniform" is ambiguous. The wording is taken from other existing rules. Additionally, "reasonably" is contained in numerous statutes both at the federal level and nationally, and has been interpreted by numerous courts.. If the NS has a problem with the word, we do not object to its deletion, if the other Class I railroads agree.

On p.18-19 the NS states the words "de minimus" are vague. The words were inserted in the proposal at the insistence of the railroads, not the Petitioner. If the railroad can show it has been in good faith in an attempt to comply with this part of the rule, there will be no violation. Also, there are many court cases in the country interpreting the words.

Once again the NS argues against the slope measurements.(p. 20, par.118). It purports not to know how to make the measurements. The other

Class 1 railroads in California have been making such measurements at least since 1963. Moreover, the diagrams originally attached to the Petition show how the measurements are determined. NS can view those diagrams. The diagrams were removed from the final proposal because of the request of the railroads. Also, it is curious that neither of the NS's civil engineer witnesses, Neither Messrs. Joseph Lynch nor James Gearhart knew that the western railroads had been operating for many years with the same slope standard as proposed here.(Hearing Tr.206,208, 246). Mr. Lynch did not know that the Oregon and Washington walkway rules were in effect.(Hearing Tr.208. *See,* Pet. Exhs. 11 and 14).

On p.21 NS again opposes the use of the words "reasonably free" as being vague. We have already discussed this point. The railroad states that it is impossible to keep the walkway free from rock. We have no objection to adding after the word "rock" the words "other than ballast", or to place a condition that the rock be only ballast used by the railroad for the walkway.

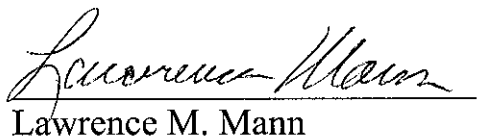
On p. 22 it is stated that the proposed rule may conflict with the track center requirements of the Illinois law, 92 Ill. Adm. Code 1500.10 *et seq.* First, the proposed rule generally applies to new track being constructed. Also, the waiver provisions of the proposed rule could be utilized.

On p.22-23 the railroads question the requirement to rebuild a walkway where safety hazards exist. These requirements are the same as in the states we have previously discussed herein. It has not been a problem for the railroads in those states.

Lastly, the NS opposes the waiver requirement. It was inserted to ease any particular problems which a railroad may encounter in complying with the rule. Does NS want the waiver section deleted?

Respectfully Submitted,

Alper & Mann



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 2003, that I mailed postage prepaid to all parties of record a copy of the United Transportation Union's Response to the Joint Response of Norfolk Southern Railway Co., et al., submitted herein on September 29, 2003.

Lawrence M. Mann
Attorney for United Transportation Union

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

UNITED TRANSPORTATION UNION ILLINOIS STATE LEGISLATIVE BOARD	)	
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NOTICE OF FILING

Please take notice that on this 16th day of October, 2003, I have forwarded for filing with the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, the attached Brief of United Transportation Union in Response To Brief of Norfolk Southern Railway Co., et al.

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